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In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,

Petitioners,

v.

LAURA NEZTSOSIE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Navajo Nation courts retain, in the first instance, jurisdiction to determine jurisdiction over a tort committed by a uranium mining company against a Navajo on Navajo trust land.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. THE LONGSTANDING RULE OF INDIAN LAW PROHIBITING IMPLICIT DIVESTITURE OF TRIBAL SOVEREIGNTY MANDATES THAT THE NAVAJO NATION'S JUDICIAL AUTHORITY REMAINS INTACT BECAUSE IT HAS NOT BEEN *EXPRESSLY* EXTINGUISHED 3

B. THE NAVAJO NATION JUDICIAL SYSTEM HAS A HIGHLY DEVELOPED AND SOPHISTICATED STRUCTURE WITH AN INTERNATIONAL REPUTATION FOR FAIRNESS AND INTEGRITY, FULLY CAPABLE OF DETERMINING JURISDICTIONAL MATTERS IN THE FIRST INSTANCE 10

1. This Court Has Endorsed The Competence Of The Navajo Nation Judicial System 10

2. The Navajo Judiciary Has Consistently Guaranteed Due Process To Litigants 12

3. The Navajo Nation's Reputation For Fairness Has Been Acknowledged By The Non-Indian Business Community 18

4. Navajo Nation Courts Have The Proven Capability To Analyze Complex Federal Issues Including Preemption 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Atkinson Trading Co. v. Navajo Nation, 866 F. Supp. 506 (D. N.M. 1994) 11

Authier v. Ginsburg, 757 F.2d 796 (6th Cir. 1985) 20

Dennison v. Tucson Gas and Electric Co., 1 Nav. L. Rep. 95 (Nav. Ct. App. 1974) 16, 17

In Re Estate of Jumbo, 17 Indian L. Rptr. 6042 (Nav. Sup. Ct. 1990) 19

In the Matter of BHP Minerals, Inc., Navajo Tax Commission Case No. 85-001, slip op. (Aug. 5, 1994) 19

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ... 6, 7

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997) 9

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 10

Largo v. Gregory & Cook, Inc., 22 Indian L. Rptr. 6040 (Nav. Sup. Ct. 1995) 17

Marshal v. Chase Manhattan Bank, 558 F.2d 680 (2nd Cir. 1977) 20

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6

Montana v. United States, 450 U.S. 544 (1981) 3, 4, 9

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 5, 7, 9

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 14

Pela v. Peabody Coal Company, 17 Indian L. Rptr. 6132 (Nav. Sup. Ct. 1990) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Reservation Business Services v. Albert, 22 Indian L. Rptr. 6102 (Nav. Sup. Ct. 1995) 17

Rough Rock Community School v. Navajo Nation, No. SC-CV-06-94, slip. op. (Nav. Sup. Ct. Mar. 14, 1996) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ...7, 8

Strate v. A-1 Contractors, 520 U.S. 438 (1997)..... 4, 7, 8

TBI Contractors v. The Navajo Tribe of Indians, 16 Indian L. Rptr. 6017 (Nav. Sup. Ct. 1988) 17

Williams v. Lee, 358 U.S. 217 (1959)..... 10

STATUTES AND TREATIES

1 N.N.C. § 3 17

7 N.N.C. § 201 11

7 N.N.C. § 204(A) 19, 20

7 N.N.C. § 253 .....11, 12

7 N.N.C. § 254 12

7 N.N.C. §§ 301 and 302..... 12

25 U.S.C. § 631..... 10

29 U.S.C. § 1132(a)(1)(B) 20

42 U.S.C. §§ 10169, 10175, 10191 and 10199 8

Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495..... 8

Federal Employee's Group Life Insurance Act, 5 U.S.C. § 8705(a) 20

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 78, 91st Cong., 1st Sess., 8 (1969)..... 10

Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* ...13, 16

Indian Tribal Justice Act of December 3, 1993, P.L. 103-176, 107 Stat. 2004, 25 U.S.C. § 3601 .....5, 14

Navajo and Hopi Rehabilitation: Hearing Before Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476, 81st Cong., 1st Sess. (1949) 10

Navajo Nation Bill of Rights, 1 N.T.C. § 3 18

Navajo Tribal Council Resolution No. CAP-22-86 (Apr. 25, 1986) 18

Navajo Tribal Council Resolution No. CJA-5-59 (Jan. 9, 1959) 10

Navajo Tribal Council Resolution No. CJA-18-60 (Jan. 22, 1960), *as amended*, 16 N.N.C. §§ 1401-1403 16

Navajo Tribal Council Resolution No. CO-63-67 (Oct. 9, 1967), *as amended*, 1 N.N.C. §§ 1-9 16

Navajo Tax Commission Resolution No. TAX-86-0036 (Sept. 26, 1986)..... 19

Navajo Tribal Council Resolution No. CD-68-89 (Dec. 15, 1989) 15

Navajo Tribal Council Resolution No. CD-94-85 (Dec. 4, 1985) 15

S.1407, 81st Congress, 1st Sess. § 9 (reprinted at 95 Cong. Rec. H. 13659-60 (Oct. 3, 1949)); S. Doc. No. 119, 81st Cong., 1st Sess. 2 (1949) 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Aboriginal Rights: Western United States of America, 2 Law & Anth. 195 (1987) 11

Civil Rights in Indian Country: Tribal Court Decisions 1988-92 (Apr. 30, 1993) 13

Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992, 18 Am. Indian L. Rev. 379 (1994) 12

"Lawyers as Peacemakers: Our Navajo Nation Peers Could Teach Us a Thing or Two about Conflict Resolution," *ABA Journal* 6 (Dec. 1995) 15

Life Comes from it: Navajo Justice Concepts, 24 N.M. L. Rev. 175 (1994) 11

"O'Connor Says Tribal Courts Offer Lessons," 12 *American Indian Report* 10 (July 1996)..... 15

The Process of Decision Making in Tribal Courts, 31 Ariz. L. Rev. 225 (1989)..... 12

"Tribal Justice Systems," in D. Getches, C. Wilkinson & R. Williams, *Federal Indian Law* 493-550 (3d Ed. 1993)..... 13

American Indian Policy Review Commission, *Final Report* 167 (1977)..... 14

Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275 (1991)..... 18

Lessons from the Third Sovereign: Indian Tribal Courts (June 4, 1996) 15

TABLE OF AUTHORITIES – Continued

Page

National Indian Justice Center, *"Tribal Court Report"* (Sept. 1996)..... 15

Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285 (1998) 14

R. Young, *Navajo Yearbook (1961)* 10

Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights entitled "Indian Civil Rights Act": Hearing Before the Senate Select Committee on Indian Affairs, 102d Cong., 1st Sess. 9 (1991) 14

INTEREST OF THE *AMICUS CURIAE*

The interest of the Navajo Nation is self-evident.

Navajos were injured on Navajo Nation trust land. The land had been commercially leased to Petitioner (or its predecessor), but the land was always, and remains to this day, owned by and within the borders of the Navajo Nation, under its direct supervision and control.

The subject site and all similar mining locations are currently under the direct maintenance of, and being cleaned up by, the Navajo Nation.

It is the Navajo Nation's sovereignty which Petitioners attack when they challenge the Navajo Nation's jurisdiction to decide jurisdiction.

This attack on our judiciary and sovereignty violates established federal law.

This *amicus* brief of the Navajo Nation does not presume to address the underlying merits, nor whether Navajo Nation courts in fact *have* jurisdiction (nor, to some extent, whether Price-Anderson applies at all). Rather, our only point is that Navajo Nation sovereignty requires that our judiciary have its proper and necessary first opportunity to determine jurisdiction.[1]

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[1] The parties have consented to the filing of this brief by the Navajo Nation. The consents have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF FACTS

The Navajo Nation is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying over 25,000 square miles of trust lands within three states, Arizona, New Mexico and Utah. The present Navajo government structure is in three branches: Executive, Legislative and Judicial. The Executive Branch includes the President of the Navajo Nation, the Vice President, and appointed officials overseeing 10 divisions and several offices. The Legislative Branch consists of the Speaker of the Council and the Navajo Nation Council comprised of 88 elected council delegates representing 110 chapters. The Judicial Branch includes the Chief Justice and the Navajo Nation trial and appellate courts. Elections for the President and the delegates are held every four years in November.

The Navajo Nation hereby adopts and incorporates by reference the "Statement of the Case" as presented in Respondents' Brief in Opposition to Petition (p. 1-3) filed with this Court.

SUMMARY OF ARGUMENT

This case at this juncture is about one thing: established Indian law exhaustion principles require that the Navajo Nation Supreme Court simply be permitted, in the first instance, to exercise jurisdiction to determine jurisdiction.

If Price-Anderson applies, defendants like petitioners have an automatic right to remove "any action" to federal court. Notice of Removal was not filed in this case.

Rather, petitioners unsuccessfully moved to dismiss the action then pending in the district court of the Navajo Nation. At that point, they sought injunctive federal relief, essentially denied by the federal trial court and the Court of Appeals.

Petitioners' present argument is defeated by the established rule that Congressional divestiture of Indian court jurisdiction must be express, not implied. Even assuming *arguendo* the theoretical validity of Petitioners' claim, it nevertheless fails because both *Montana* exceptions apply.

In addition, the Navajo Nation judiciary has been recognized by this Court and numerous federal and state appellate courts for a well-deserved reputation for fairness, competence and integrity. Coupled with the overriding issues of Navajo Nation sovereignty at stake, the Navajo judiciary is thus fully capable of exercising jurisdiction to determine jurisdiction.

ARGUMENT

A. THE LONGSTANDING RULE OF INDIAN LAW PROHIBITING IMPLICIT DIVESTITURE OF TRIBAL SOVEREIGNTY MANDATES THAT THE NAVAJO NATION'S JUDICIAL AUTHORITY REMAINS INTACT BECAUSE IT HAS NOT BEEN *EXPRESSLY* EXTINGUISHED.

In *Montana v. United States*, this Court articulated a rule governing the authority of tribes over non-member

conduct on the reservation. This "general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). However, *Montana's* rule does not apply in Petitioners' case because their activities took place on Navajo Nation trust land.[2]

But even if *Montana* governs, there are two exceptions to its general rule which apply: 1) when a nonmember enters into a consensual relationship with the Indian tribe or its members, and 2) when the conduct of the non-member threatens or has some direct effect on the health or welfare of the tribe.

These Petitioners entered into a consensual leasehold relationship with the Navajo Nation to conduct business for profit on Navajo Nation trust land. In addition, Petitioners' alleged harmful activity threatened the health and welfare of the Navajo community (tribal members and non-members alike). There is no dispute that the Navajo Nation has continued to exercise governmental

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[2] "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, . . . " *Montana*, at 510 (*emphasis added*). In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997) this Court clarified: "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of non-members *on non-Indian land* within a reservation, . . . " *Strate*, 117 S.Ct. at 1409 (*emphasis added*). This Court went on to say "We 'can readily agree,' in accord with *Montana*, that tribes retain considerable control over non-member conduct *on tribal land*." *Strate*, 117 S.Ct. at 1413 (*citation omitted*) (*emphasis added*).

control over the mine sites. *See* Joint Appendix 88A, note 5. Thus, the Navajo Nation's sovereign authority is retained and needs no affirmative delegation from Congress.

In addition to this Court's jurisprudence regarding retained inherent sovereignty of Indian tribes, Congress has found that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems [which] are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[3]

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[3] Indian Tribal Justice Act, P.L. 103-176, H.R. Conf. Rep. No. 383, 103rd Cong., 1st Sess. 1993 (Nov. 19, 1993).

This Court has concurred: "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. . . . This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory', . . . to the extent that sovereignty has not been withdrawn by federal statute or treaty. . . . Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. . . . A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts as we recognized in *National Farmers Union*. . . . Promotion of tribal self-government and self-determination require(s) that the Tribal Court have the 'first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction. . . . Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction' . . . proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'. . . . The federal

Contrary to Petitioners' contentions, neither the jurisdictional provisions in the Price-Anderson Amendments Act, nor the federal regulatory scheme governing nuclear activity, divest the Navajo Nation of this retained sovereign authority.[4] In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) this Court clearly announced "[C]ivil jurisdiction . . . presumptively lies in the tribal courts unless *affirmatively limited* by a specific . . . federal statute. . . . '[T]he proper inference from silence is that the sovereign power . . . remains intact.' " *Id.* at 18 (*emphasis added*) *quoting with approval Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

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policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal court." *Iowa Mutual*, 94 L.Ed. 2d at 18 *et seq.* (*citations and footnotes omitted*).

[4] Petitioners erroneously *assumed* that Price Anderson does not anticipate removal from Navajo Nation courts and never filed a Notice of Removal. This is clearly wrong since the statute expressly states that " . . . *any* such action pending on the date of . . . enactment [Aug. 20, 1988] . . . *shall* be removed (upon motion of Defendant)" (*emphasis added*). Had Petitioners filed a Notice of Removal, they would have automatically put themselves in front of a federal judge (where they wanted to be), but without violating this Court's established Indian law exhaustion principles. Statutory silence presumes Navajo Nation court jurisdiction. In turn, this is automatically subject to removal, but only if the Defendant so elects. Petitioner had the option to remove but did not take it. Rather, they merely unsuccessfully moved to dismiss and then sought federal injunctive relief, bypassing their enunciated statutory right.

Likewise, in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), as later ratified in note 7 of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court supported exhaustion of Indian court jurisdiction, although wisely noted that the exhaustion rule must yield under three precise exceptions: (1) harassment/bad faith; (2) *express* jurisdictional prohibition; or (3) futility due to inadequate appellate review, none of which apply to the Navajo Nation in this case.

Importantly, Petitioner in *Iowa Mutual* made an argument analogous to the "federal homogeneity for nuclear torts" contention that Petitioners and their corporate *amici* offer here that the federal statutory grant of diversity jurisdiction overrode the clear and oft-enunciated federal policy of deference to tribal courts. Neither of these arguments is sufficient to overcome the paramount federal Indian policy of deference. This Court was unpersuaded in *Iowa Mutual* and should remain steadfast here, since the exhaustion rule and Congress' policy of promoting tribal judicial systems complement each other and serve as the foundation of tribal sovereignty.

Fundamentally, sovereignty is the right and exercise of a people to make and live by their own law. It is this very sovereignty, this "tribal self-government", which longstanding federal policy has encouraged and nurtured through a sovereign-to-sovereign relationship which is very distinct from the federal relationship to the fifty states.

This is because (a) the power of the federal government flows *from* the States and their people via the Constitutional Convention and its inspired and historic

result; (b) the States as political entities are already sufficiently and adequately evolved and do not need such special encouragement; and (c) the States are powerful enough to protect their jurisdictional territory via the very doctrine of federalism.[5]

Yet, on the other hand, Congress has extensive powers over the Navajo Nation and other tribes. This Court has held that tribes can have their jurisdiction limited or even abolished by federal statute. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 65 (1978).[6]

Therefore, any such limitation or divestiture must be express, not implied; stated, not presumed.[7] Likewise, it must be remembered that Congress and this Court have evolved a precise and sophisticated process to invigorate the cherished system of checks and balances.[8] Given that

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[5] Specifically, the Tenth Amendment to the Bill of Rights is a classic enunciation of state reserved power and authority.

[6] It is this very fact of the absolute and extensive power of Congress that requires the federal judiciary to scrupulously and meticulously adhere to the exact words of a statute: a legislature with plenary power need not be coddled by inference nor implication. Its express statement is sufficient: it need not hint, since it can decree.

[7] Congress certainly knows how to do this. *See, e.g.*, Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495 (expressly abolishing tribal courts in the Indian territory). Specific to the nuclear statutory scheme, Congress also knows when and how it wants to include or exclude Indian Tribes. *See, e.g.*, 42 U.S.C. §§ 10169, 10175, 10191 and 10199.

[8] *E.g., Duro* and the "*Duro* fix" as referenced in *Strate, supra*, at note 5; and, conversely, *Martinez, supra*, and the telling lack of congressional response.

Congress knows[9] the rule that jurisdictional limitations must be express not implied, and that Congress well knows how to express itself explicitly (*see* note 7, *supra*), this Court should leave it to Congress to respond legislatively, if it sees fit, to this Court's principled and plain reading of the Price-Anderson Amendments Act.

Petitioners wish to turn the longstanding exhaustion rule on its head by arguing that a statute, silent as to tribal judicial power, nevertheless extinguishes the Navajo Nation's sovereign authority to determine in the first instance its own jurisdiction over a dispute which arose on Navajo Nation trust land. The Navajo Nation urges this Court to reject that notion, as the Tenth Circuit did in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), where it found that the exhaustion presumption does apply in cases involving the Price-Anderson Amendments Act. "Given Price-Anderson's silence, civil jurisdiction over the activities of non-Indians on reservation land should be presumed to lie with the tribal court even if Congress has chosen to federalize the substantive law governing those activities." *Farley*, 115 F.3d at 1502.

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[9] It is a given that Congress, when it legislates, is aware of this Court's interpretations. *See, e.g.*, note 2 in *Montana v. U.S., supra*, "Congress was, of course, aware of this presumption once it was established by this Court."

B. THE NAVAJO NATION JUDICIAL SYSTEM HAS A HIGHLY DEVELOPED AND SOPHISTICATED STRUCTURE WITH AN INTERNATIONAL REPUTATION FOR FAIRNESS AND INTEGRITY, FULLY CAPABLE OF DETERMINING JURISDICTIONAL MATTERS IN THE FIRST INSTANCE.

1. This Court Has Endorsed The Competence Of The Navajo Nation Judicial System.

As early as 1959, this Court recognized that the Navajo Nation's courts are competent to adjudicate reservation disputes between Navajos and non-Indians. *Williams v. Lee*, 358 U.S. 217 (1959).[10] "The Navajo government has been called 'probably the most elaborate among tribes'. H.R. Rep. No. 78, 91st Cong., 1st Sess., 8 (1969). The legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question." *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985).[11]

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[10] The Navajo judiciary had been sponsored and maintained by the Department of the Interior Bureau of Indian Affairs when the Navajo Tribal Council formally transferred Navajo courts over to the Navajo Nation via Navajo Tribal Council Resolution CJA-5-59 (Jan. 9, 1959). R. Young, *Navajo Yearbook (1961)* 285-286.

[11] President Truman vetoed legislation which would have permitted states to exercise concurrent jurisdiction over the Navajo and Hopi reservations. *See* S.1407, 81st Congress, 1st Sess. § 9 (reprinted at 95 Cong. Rec. H. 13659-60 (Oct. 3, 1949)); S. Doc. No. 119, 81st Cong., 1st Sess. 2 (1949) (veto message). Congress then passed the legislation without the provisions that would have allowed state jurisdiction over the allotments. *See* 25 U.S.C. §§ 631, *et seq*. The allotments "of the Navajo reservation" to which Congress referred were those in the Eastern Navajo Agency. *See, e.g.*, Navajo and Hopi Rehabilitation: Hearing Before Subcommittee on Indian Affairs of the Committee on Public Lands on H.R. 3476, 81st Cong., 1st Sess. (1949), at 80, 95, 121, 126, 130 and 261 (referring to Eastern Navajo communities located in a checkerboard area of the Navajo Nation). 7 N.N.C. §§ 201 *et seq*.

Resolution of the jurisdictional issue here requires careful analysis of both federal and Navajo law. Navajo Nation courts are up to the task. "The Navajo Nation has developed a sophisticated judicial system with highly competent jurists." *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D. N.M. 1994).

The courts of the Navajo Nation have been in continuous operation since the early 1900's. A system of just dispute resolution has existed under the Navajo common law for centuries.[12]

Currently there are seven general jurisdiction District Courts at locations throughout the Navajo Nation,[13] plus a system of specialized, limited jurisdiction courts such as the Family Courts and the world-renowned Peacemaker Courts. The Navajo Nation Supreme Court, sitting at Window Rock, Navajo Nation (Arizona), exercises direct

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[12] *See, e.g.*, Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); Zion, *Aboriginal Rights: Western United States of America*, 2 Law & Anth. 195 (1987) (World Survey by the International Academy of Comparative Law).

[13] 7 N.N.C. § 253. The District Courts are located at Window Rock, Kayenta, Chinle and Tuba City, Navajo Nation (Arizona) and at Crownpoint, Shiprock and Ramah, Navajo Nation (New Mexico).

or indirect appellate jurisdiction over all matters arising within the Navajo Nation courts and administrative forums.[14]

2. The Navajo Judiciary Has Consistently Guaranteed Due Process To Litigants.

The Navajo Nation courts exercise jurisdiction within the Navajo Nation pursuant to 7 N.N.C. § 254 (territorial jurisdiction) and 7 N.N.C. § 253 (adjudicatory jurisdiction.)

Navajo jurisprudence has routinely provided appropriate and adequate remedies to all persons, whether Navajo or not, from tortious conduct, breaches of contract and civil rights violations. The concept of justice runs deep within the culture of the Navajo people, and informs all government activity. In the Navajo way, individual rights and responsibilities, as well as the rights and responsibilities of the larger community, are considered in every dispute resolution.[15]

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[14] 7 N.N.C. §§ 301 and 302. "The courts of the Navajo Nation this year will decide about 25,000 civil and criminal cases, and this figure does not include traffic offenses, juvenile matters, alternative traditional court proceedings, or appeals . . . Tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago. Statement of Hon. William C. Canby, Jr., Judge, United States Court of Appeals for the Ninth Circuit, Senate Committee on Indian Affairs Oversight Hearing on Indian Tribal Justice Act, Aug. 2, 1995.

[15] Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225 (1989); Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992*, 18 Am. Indian L.

Indian nation courts have been thoroughly studied. They have been found to provide effective protection of individual civil rights.[16]

Rev. 379 (1994) (survey of Navajo Nation decisions); "Tribal Justice Systems," in D. Getches, C. Wilkinson & R. Williams, *Federal Indian Law* 493-550 (3d Ed. 1993) (survey of Indian nation courts with particular emphasis on the Navajo Nation judicial system).

[16] A five-year survey of Indian nation court civil rights cases, which reviewed reported Indian nation court decisions in the *Indian Law Reporter*, including several Navajo Nation decisions, concluded that

> The cases discussed in this memorandum make clear that tribal courts are protecting the rights of tribal members and upholding important principles of judicial review. The courts are attempting to meld tribal custom and norms with applicable legal doctrines. The decisions show impartiality and careful thought. Although the courts are fledgling and require greater resources to develop in their sophistication, it is clear that people in Indian country can safely turn to the courts when they feel their rights are threatened.

Marx, *Civil Rights in Indian Country: Tribal Court Decisions 1988-92* at p. 13 (Apr. 30, 1993) (unpublished manuscript; copy on file with the Office of the Chief Justice of the Navajo Nation Supreme Court).

The Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*, adopted in 1968, is a congressional decision that Indian nation governments are competent to assure civil rights for all citizens, Indian and non-Indian alike.

In the 1970's the American Indian Policy Review Commission, a congressional body which did the most extensive survey of Indian policy in this century, studied Indian judicial systems. Its Final Report concluded that Indian nation courts are competent justice bodies – if only Congress would appropriate significant additional funds to operate them.

Although this discussion focuses on the legitimacy of the Navajo Nation's judicial system, many other Indian nations have evolved sophisticated and very competent courts, capable of adjudicating important interests of Indian and non-Indian alike. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285 (1998). In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978), this Court stated, "We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts."

Tribal courts are "capable of administering justice as well as it is done in many of our courts." Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights entitled "Indian Civil Rights Act": Hearing Before the Senate Select Committee on Indian Affairs, 102d Cong., 1st Sess. 9, at 9 (1991) (statement of Monroe G. McKay, Chief Judge, United States Court of Appeals for the Tenth Circuit).

One of the most important commentators who has concluded that Indian nation courts are effective guardians of justice is this Court's Justice Sandra Day

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American Indian Policy Review Commission, *Final Report* 167 (1977).

Yet again, in 1990 the United States Civil Rights Commission revisited these issues. The Commission rejected federal review to guarantee civil rights and instead recommended that Congress address the issue of the ability of Indian nation courts to do their job by providing adequate funding to operate them. Congress responded by enacting the Indian Tribal Justice Act of December 3, 1993, P.L. 103-176, 107 Stat. 2004, 25 U.S.C. §§ 3601 *et seq.*

O'Connor. In 1996, in a speech before the annual Sovereignty Symposium, which was sponsored by the Oklahoma Supreme Court and the Indian nation courts of Oklahoma, Justice O'Connor praised the third judicial sovereign for effectively guaranteeing the rights of all and gave special mention of Indian lessons for restorative justice.[17] Justice O'Connor singled out Navajo peacemaking as an effective alternative to litigation.[18]

Nor is it surprising that the Navajo Nation judiciary is as evolved and sophisticated as it is, particularly since it is an absolutely separate and independent branch of government.[19]

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[17] *Lessons from the Third Sovereign: Indian Tribal Courts*, delivered June 4, 1996. *See also*, National Indian Justice Center, *"Tribal Court Report"* (Sept. 1996) and "O'Connor Says Tribal Courts Offer Lesson," 12 *American Indian Report* 10 (July 1996).

[18] The President of the American Bar Association also recently praised traditional Navajo justice ways and recommended that American lawyers behave like Navajos. Ramo, "Lawyers as Peacemakers: Our Navajo Nation Peers Could Teach Us a Thing or Two about Conflict Resolution," *ABA Journal* 6 (Dec. 1995).

[19] The Navajo Tribal Council explicitly acknowledged this in its Resolution creating the 1985 Judicial Reform Act citing the requirement of a "strong and independent" judiciary being crucial to our sovereignty: "(9). If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three branch form of government. . . . Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law." Navajo Tribal Council Resolution CD-94-85 (Dec. 4, 1985); *see also* Navajo Tribal Council Resolution CD-68-89 (Dec. 15, 1989), Resolved Clause 6.

Not only is the general tripartite structure of the Navajo Nation modeled after the federal government, its judiciary has adopted many of the particular safeguards and procedures of the United States courts.[20]

Over 30 years ago, in 1967,[21] the Navajo Nation Council enacted the Navajo Nation Bill of Rights[22] guaranteeing the individual rights and liberties of all persons, whether Indian or not. [And this was not the first time that the Navajo Nation had so legislated: in 1960, for example, it guaranteed both due process and just compensation for interference with private property rights, formally legislating what had been in Navajo common law for decades].[23]

The Navajo Nation Bill of Rights is more expansive and protective of individual rights than either the Indian Civil Rights Act or the federal Bill of Rights. The Navajo Nation Bill of Rights extends to *all* persons, regardless of race or gender, freedom of speech and press and religious expression, the right to assemble peaceably and petition

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[20] For example, the Navajo Nation Rules of Evidence, Civil, Criminal and Appellate Procedures all clearly are derived from, and are frequently virtually identical to, their federal counterparts.

[21] This anticipated the federal Indian Civil Rights Act, 25 U.S.C.A. §§ 1301 *et seq.* by one year.

[22] Navajo Tribal Council Resolution No. CO-63-67 (Oct. 9, 1967), *as amended*, 1 N.N.C. §§ 1-9.

[23] Navajo Tribal Council Resolution No. CJA-18-60 (Jan. 22, 1960), *as amended*, 16 N.N.C. §§ 1401-1403. *See also Dennison v. Tucson Gas and Electric Co.*, 1 Nav. L. Rep. 95 (Nav. Ct. App. 1974).

for governmental redress, the right to be free from unreasonable search and seizure, the right to just compensation in eminent domain, the right to keep and bear arms, the right to counsel and jury trial and to be free from self-incrimination, double jeopardy, cruel and unusual punishment, and excessive bail and fines. The Navajo Bill of Rights guarantees due process and equal protection to *all*, Indians or not.[24]

But this Navajo Nation Bill of Rights is not merely aspirational. It has been routinely and effectively enforced by our courts. For example, a quarter century ago, these rights were judicially enforced by the Navajo Nation Supreme Court against the Tribal Council, requiring both due process and just compensation.[25]

Again, in *Rough Rock Community School v. Navajo Nation*, No. SC-CV-06-94, slip op. at 6-7 (Nav. Sup. Ct. Mar. 14, 1996), the Navajo Supreme Court stated:

> The schools raise an issue which is very important to Navajo Nation economic development: Maintenance of a favorable climate to outside business. The schools cite our decisions which express concern for promoting economic development and prosperity, *e.g., TBI Contractors v. The Navajo Tribe of Indians*, [16 Indian L. Rptr. 6017 (Nav. Sup. Ct. 1988)]; *Largo v. Gregory & Cook, Inc.*, [22 Indian L. Rptr. 6040 (Nav. Sup. Ct. 1995)]; and *Reservation Business Services v. Albert*, [22 Indian L. Rptr. 6102 (Nav. Sup. Ct.

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[24] *See, generally*, 1 N.N.C. §§ 3 *et seq.*

[25] *See* note 23, *supra*. In *Dennison* the Navajo Nation high court held that there can be no taking of private property without just compensation.

1995)]. The Navajo Nation courts are aware of the economic consequences of their decisions, and they have a reputation for protecting legitimate business interests. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275 (1991). Today's decision does not mark a departure from that policy. Business entities and semi-public organizations, such as the community school districts here, have due process protections under the Navajo Nation Bill of Rights, 1 N.T.C. § 3.

3. The Navajo Nation's Reputation For Fairness Has Been Acknowledged By The Non-Indian Business Community.

This enduring commitment to judicial independence and integrity, along with the sophisticated cooperative commercial environment[26] found at the highest level of

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[26] The Navajo Nation government fully recognizes that non-Indian companies provide a huge slice of the economic pie. In Fiscal Year 1998, more than ninety percent of its general fund revenues are derived from oil & gas, mining, etc., leases and rights-of-way. This situation is underscored since, unlike other Native American nations, gambling as a source of government revenue has twice been rejected by popular referenda in November 1994 and again in November 1997.

In the context of litigation and commercial disputes, the Navajo Nation has often cooperated to assure such companies a fair and impartial process of resolving any disputes. For example, in 1978, the Navajo Nation enacted its tax program, but thereafter granted amnesty to the construction industry for all tax periods prior to 1986, in order for a workable collection system to be developed based on industry comments. *See* Navajo Tribal Council Resolution No. CAP-22-86 (Apr. 25, 1986) and Navajo Tax Commission Resolution No. TAX-86-0036 (Sept. 26, 1986).

The Nation maintains a substantial amount in the Tax Administration Suspense Fund so that judgments favoring taxpayers may be promptly paid in full. During a 12-year dispute regarding 80 million dollars in taxes on a coal mining operation, the Navajo Nation entered into an agreement whereby the non-Indian company paid taxes into an escrow account pending resolution of the dispute. *See, e.g., In the Matter of BHP Minerals, Inc.*, Navajo Tax Commission Case No. 85-001, slip op. at p. 2 (Aug. 5, 1994). This tax dispute was ultimately settled amicably with the company.

the Navajo Nation government has been acknowledged by the business world at large.

In short, the Navajo Nation government and our judiciary is sophisticated, competent, professional and mature. It is certainly capable – and this must be made clear – to adjudicate whether or not it has jurisdiction, and then to determine whether to assume or defer it. The interest of the Navajo Nation in this case is only to have the first opportunity to determine these issues.

4. Navajo Nation Courts Have The Proven Capability To Analyze Complex Federal Issues Including Preemption.

"In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any law or customs of the Navajo Nation not prohibited by applicable federal laws." 7 N.N.C. § 204(A).

The Navajo Nation's courts have followed this mandate. In *In Re Estate of Jumbo*, 17 Indian L. Rptr. 6042 (Nav.

Sup. Ct. 1990), the Navajo high court followed 7 N.N.C. § 204(A) and found that portions of the Federal Employee's Group Life Insurance Act, 5 U.S.C. §§ 8705(a), *et seq.* preempted and controlled the issues before it.

In *Pela v. Peabody Coal Company*, 17 Indian L. Rptr. 6132 (Nav. Sup. Ct. 1990), the Navajo Nation Supreme Court held:

> Congress has expressly reserved to the federal courts exclusive jurisdiction over most claims brought under ERISA. The reason for this is that Congress intended 'that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent local regulation'. *Pela*, at 7 citing *Marshal v. Chase Manhattan Bank*, 558 F.2d 680, 683 (2nd Cir. 1977). By granting federal courts exclusive jurisdiction, Congress wanted 'to create a body of federal substantive law regulating pension plans'. *Pela*, at 7, citing *Authier v. Ginsburg*, 757 F.2d, 796, 799, n. 5 (6th Cir. 1985). 'Thus, in those areas of ERISA under exclusive federal court jurisdiction, Congress undoubtedly wanted uniformity in enforcement and regulation, and therefore, the state and tribal courts have no jurisdiction in those areas.'
>
> Congress, however, did not require uniformity of enforcement and regulation under 29 U.S.C. § 1132(a)(1)(B). Pursuant to section 1132 (a)(1)(B), one may sue in a non-federal court, and have the court apply local law, to recover benefits, enforce benefits or clarify rights to future benefits, under a plan. Mr. Pela sued under this provision and we see no reason why a Navajo Nation court should not provide Mr. Pela or any party with relief using Navajo or non-Navajo law. We believe Congress has provided for use of non-federal courts and of local law to decide claims brought under section 1132 (a)(1)(B). *Pela*, at 6134.

In short, Navajo Nation courts are a competent and integral part of the federal system.

CONCLUSION

The failure to pursue removal is fatal to Petitioners' cause, them to now champion the negative implication of assumed congressional inaction that, Petitioners claim, divests Navajo Nation court jurisdiction.

This failure even to attempt removal was Petitioners' choice. Their proposed remedy for their failue is self-serving and would slash the rich tapestry of Indian law, woven by Congress and this Court for more than 150 years, which exhibits a primary thread: Indian nation jurisdiction exists except where expressly limited. Petitioners seek to stand this fundamental principle on its head and create *new* law: that jurisdiction is barred except

where expressly conferred. This is not and cannot be what Congress ever intended.

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